U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Services	)	CC Docket No. 98-147
	)	

COMMENTS ON THE INITIAL REGULATORY FLEXIBILITY ANALYSIS, NOTICE OF PROPOSED RULEMAKING, AND REQUEST FOR CLARIFICATION OF THE MEMORANDUM OPINION AND ORDER OF THE OFFICE OF ADVOCACY UNITED STATES SMALL BUSINESS ADMINISTRATION

Jere W. Glover, Esq.,
Chief Counsel for Advocacy
S. Jenell Trigg, Esq.,
Assistant Chief Counsel for Telecommunications
Eric E. Menge, Esq.,
Assistant Chief Counsel for Telecommunications
Office of Advocacy
U. S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416

September 25 1998

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EXECUTIVE SUMMARY

The Office of Advocacy of the United States Small Business Administration ("Advocacy") submits these Comments on the Federal Communications Commission's ("FCC" or Commission") *Memorandum Opinion and Order and Notice of Proposed Rulemaking,* CC Docket. No. 98-147, FCC 98-188, (rel. Aug. 7, 1998) ("*NPRM*"), in the Advanced Telecommunications Services proceeding. Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637) to represent the views and interests of small business within the Federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies. 15 U.S.C. § 634c(1)-(4). Advocacy also has a statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

The FCC is required to prepare a regulatory flexibility analysis as a matter of law pursuant to the RFA when there is a "significant economic impact on a substantial number of small entities." *See* U.S.C. § 605. Advocacy asserts that the FCC has not complied with the following statutory requirements of the RFA.

- The FCC failed to identify properly and include all classes of small entities in its analysis when it neglected to recognize small incumbent local exchange carriers ("ILECs") as small entities. Small ILECs qualify as small businesses under the Small Business Act. Dominance "in a field of operation" is determined on a national basis for the purposes of

that Act, 13 C.F.R. § 121.102, and since small ILECs are not dominant in the national telecommunications industry, they qualify as small entities.

- The FCC failed to describe adequately the proposed reporting, recordkeeping, and other compliance requirements both by only disclosing three of the six compliance requirements proposed in the *NPRM*, and by not disclosing completely the three that were discussed. Advocacy makes the following comments on the proposed compliance requirements:

  1. Equipment Approval for Collocation in Central Offices.

  a) The FCC did not discuss in its regulatory flexibility analysis that ILECs are required to produce a list of all the equipment it uses.

  b) This requirement would create a compliance burden for both small competitive local exchange carriers ("CLECs") and small ILECs. Small ILECs must review and approval every type of equipment while CLECs must only use approved equipment.

  2. Removal of Obsolete Equipment from the Central Office.

  a) The FCC did not discuss this compliance burden in its regulatory flexibility analysis. Advocacy believes that if language presented in the *NPRM* could lead to a final rule, the FCC must disclose the requirement, regardless of whether it is a tentative conclusion or not.

  b) This requirement would create a compliance burden for small ILECs, who often use older but functional equipment. This equipment could be deemed obsolete, and the ILEC would be required to remove it.

  3. Uniform National Standards

  a) The FCC did not discuss this compliance burden in its regulatory flexibility analysis. The RFA applies to any regulation that places a burden on small entities and is not limited to reporting and recordkeeping requirements.

  b) The requirement would create a compliance burden for small ILECs who would be required to review its equipment and ensure it complies with the national standards.

4. Tours of the Central Office.

a) The FCC did not discuss this compliance burden in its regulatory flexibility analysis.

b) The requirement would create a compliance burden by requiring small ILECs to give tours of its central offices. Advocacy does not believe the benefit to CLECs outweighs the burden to small ILECs

5. Report on Available Collocation Space

a) The FCC's regulatory flexibility analysis did not address key time -frame issues. The FCC did not discuss how long after the passage of the final order before the CLEC could request these reports, and how long the ILEC had to provide the report to a requesting CLEC

b) The requirement imposes a compliance burden on small ILECs that is disproportionate to the benefit to CLECs. In light of other steps taken by the FCC in the *NPRM*, such as presumptions of feasibility of interconnection arrangements and the ILEC's duty to provide unbundled access, Advocacy does not believe this requirement is necessary to the deployment of advanced telecommunications services.

6. Detailed Loop Information.

a) The FCC's regulatory flexibility analysis did not fully discuss the elements of this compliance requirement which the FCC detailed in the *NPRM*. Advocacy believes that the FCC must describe in detail proposed compliance requirements so that small entities have legitimate notice of the proposal and opportunity to comment.

b) The requirement imposes a substantial compliance requirement on small ILECs. Advocacy does not believe the benefit to CLECs justifies the extent of the burden placed on small ILECs.

- The FCC failed to consider significant alternatives to the proposed reporting, recordkeeping, and other compliance requirements that can minimize the significant economic impact of the proposed rules The FCC should consider three alternatives listed in the RFA which would minimize the proposed compliance requirements:

1. Differing compliance or reporting requirements or timetables that take into account the resources available to small entities

2. Clarification, consolidation, or simplification of compliance requirements.

3. Exemption from coverage of the rule or any part of thereof.

Advocacy concludes that the FCC's regulatory flexibility analysis is insufficient and does not meet statutory requirements. Advocacy strongly recommends that the FCC revise and re-submit for public notice and comment the initial regulatory flexibility analysis as the only means to cure the severe deficiencies of the current analysis

Advocacy has additional comments on several specific provisions of the FCC's proposals in the *NPRM and* Advocacy supports two of the Commission's proposals because the FCC uses regulatory flexibility in its decision-making process Advocacy's concerns are as follows:

- Advocacy believes that the separate subsidiary requirements are unrealistic for small ILECs and create an uneven regulatory scheme if the FCC does not lessen the requirements for small ILECs. Advocacy recommends the FCC exempt small ILECs from the following requirements presented in the *NPRM*:

  a) The ILEC and the separate affiliate may not jointly own switching facilities, land, or buildings, nor may they jointly perform operating, installation, or maintenance.

  b) The separate affiliate must provide a detailed written description of any asset or service transferred and the terms and conditions of the description on the company's Internet homepage, within ten days of the transaction.

  c) The ILEC and separate affiliate must have separate officers, directors, and employees.

  Additionally, Advocacy recommends that the FCC allow small ILECs to transfer equipment from itself to its separate affiliate.

- Advocacy opposes the FCC's proposals that a collocation arrangement offered at one location is presumed feasible at the other collocations. We believe that this presumption will limit flexibility in reaching collocation agreements.

- Advocacy believes that a CLEC's request for a feasible method of unbundling at the central office and the remote terminal should be limited by Section 251(f) exemptions. Furthermore, Advocacy recommends the FCC require a CLEC to present all acceptable forms of unbundling at the initial collocation request. The ILEC must consider each form in turn.
- Advocacy supports the following two proposals:
  1. Collocators must only pay for cost of conditioning space used.
  2. Small collocators may pay on an installment basis. However, Advocacy recommends limiting installment payments whenever the CLEC is interconnecting with a small ILEC.

Finally, Advocacy requests that the FCC issue a clarification of its MO&O. A clarification is necessary to make explicit that Section 251(f) exemptions, suspensions, and modifications apply to advanced telecommunications services.

Advocacy believes that the *NPRM* was written with large ILECs in mind. The regulations proposed and the benefits derived are only appropriate if the regulated entity is a large ILEC. The insufficient regulatory flexibility analysis seems to have been put together after the regulations proposed in the *NPRM* were decided, and its only purpose is to substantiate the conclusions of the *NPRM*. Advocacy contends that this is not sufficient treatment of regulatory flexibility. The FCC should recognize, as intended by the RFA, that a reasoned analysis will allow the FCC to reach the desired effect with the large ILECs, while not overburdening the small ILECs and CLECs. Regulatory flexibility analyses are a powerful tool. Advocacy encourages the FCC to utilize it in this proceeding for the benefit of the public interest, convenience, and necessity.

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The Office of Advocacy of the United States Small Business Administration ("Advocacy") submits these Comments on the Federal Communications Commission's ("FCC" or "Commission") *Memorandum Opinion and Order and Notice of Proposed Rulemaking,*[1] in the above-captioned proceeding. Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305[2] to represent the views and interests of small business within the Federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.[3] Advocacy also has a statutory duty to monitor and report on the Commission's compliance with the Regulatory Flexibility Act of

[1] *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, CC Docket No. 98-147, FCC 98-188 (rel. Aug. 7, 1998)("*NPRM*").
[2] Codified as amended at 15 U.S.C. §§ 634 a-g, 637.
[3] 15 U.S.C. § 634c(1)-(4).

1980 ("RFA"),[4] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Subtitle II of the Contract with America Advancement Act.[5]

Advocacy supports the Commission's efforts to open up the local loop to competition in the field of advanced telecommunications services pursuant to Section 706 of the Telecommunications Act of 1996 ("1996 Act").[6] Many information service providers ("ISPs") and competitive local exchange carriers ("CLECs") are small businesses. Allowing them to compete equally with incumbent local exchange carriers ("ILECs") for the provision of advanced telecommunications services is a worthy goal, one which will encourage the expedient deployment of such services. The *NPRM* makes several proposals that will benefit these small entities, and Advocacy applauds the FCC in its effort to allow small businesses to compete on a more equal basis.

However, in its implementation of Section 706, the Commission must keep in mind that the proposed rules affect different classes of small entities – ISPs, CLECs, and ILECs – which will differ on the issues and have conflicting interests. It is also necessary to balance these interests, only after a complete detailed analysis of the impact that the proposed rules will have on each class of small entities. The congressional intent of the RFA was for Federal agencies to use regulatory flexibility analyses as a tool, during its rulemaking process, to reach a well-founded decision based on legal, policy, and factual factors, as well as to minimize the economic impact on small entities.[7]

Advocacy asserts that the Commission has not adequately completed such an analysis, and therefore, is not in compliance with the statutory requirements of the RFA. The Commission (1)

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[4] Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).
[5] Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).
[6] 47 U.S.C. § 706.

failed to identify and undertake a proper reasoned analysis on all classes of small entities; (2) failed to describe adequately the proposed reporting, recordkeeping, and other compliance requirements, including the type of professional skills necessary for the preparation of the reports or records; and (3) failed to consider significant alternatives to the proposed reporting, recordkeeping, and other compliance requirements that can minimize the significant economic impact of the proposed rules.

I. Comments In Response To The Initial Regulatory Flexibility Analysis.

A. Purpose Of The RFA In Agency Decision Making.

The Regulatory Flexibility Act of 1980 was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.[8] The Commission is required to prepare a regulatory flexibility analysis as a matter of law pursuant to the RFA when there is a "significant economic impact on a substantial number of small entities."[9] The major objectives of the RFA are (1) to increase agency awareness and understanding of the impact of their regulations on small business; (2) to require that agencies communicate and explain their findings to the public; and (3) to encourage agencies to use flexibility and provide regulatory relief to small entities where feasible and appropriate to its public policy objectives.[10]

On March 29, 1996, SBREFA was signed into law and, *inter alia*, amended the RFA to

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[7] Regulatory Flexibility Act, Pub. L. No. 96-354, § 2(b), *see also Advocacy 1998 RFA Implementation Guide.*
[8] 5 U.S.C. § 601(4)-(5).
[9] *See* 5 U.S.C. § 605.
[10] *See generally*, Office of Advocacy, U. S. Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 1998 ("*Advocacy 1998 RFA Implementation Guide*").

allow judicial review of an agency's compliance with the RFA.[11] Even prior to the SBREFA amendments adding judicial review of final regulatory flexibility analyses, courts have held that failure to undertake a proper regulatory flexibility analysis could result in arbitrary and capricious rulemaking in violation of the Administrative Procedure Act ("APA").[12]

The RFA does not seek preferential treatment for small businesses, nor does it require agencies to adopt regulations that impose the least burden on small entities or mandate exemptions for small entities. Rather, it establishes an analytical process for determining how public issues can best be resolved without erecting barriers to competition. The law seeks a level playing field for small business, not an unfair advantage. To this end, the RFA requires the FCC to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing the burden on small entities.[13]

Under Section 603 of the RFA, whenever an agency is required to publish a general notice of proposed rulemaking, the agency is required to prepare and make available to the public an initial regulatory flexibility analysis ("IRFA").[14] This analysis must describe the impact of the proposed rule on all small entities. To provide agencies with guidance, Congress listed six specific subjects that must be addressed as part of the IRFA.[15] Each IRFA must include: (1) the reasons why the action is being considered; (2) the objectives and legal basis for the proposed rules; (3) a description and estimate (if feasible) of the number of effected small entities; (4)

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[11] *See* 5 U.S.C. § 611; The sections of the RFA that are subject to independent judicial review of final agency action are Sections 601, 604, 605(b), 608(b) and 610. 5 U.S.C. § 611. Sections 607 and 609(a) shall be reviewable in connection with the judicial review of section 604. *Id.*

[12] *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 538 (D.C. Cir. 1983).

[13] 5 U.S.C. § 604.

[14] 5 U.S.C. § 603(a).

[15] 5 U.S.C. § 603(b)-(c).

projected reporting, recordkeeping, and other compliance requirements (including professional skills necessary); (5) identification of any Federal rules which duplicate, overlap, or conflict with the proposed rules; and (6) any significant alternatives to the proposed rules which minimize any significant impact of the proposed rule.[16]

B. The Commission Failed To Meet The Requirements Of The RFA.

1. The Commission Failed To Identify Properly And Undertake An Analysis For All Classes Of Small Entities.

The first step in undertaking a proper regulatory flexibility analysis is to identify all of the classes of small entities affected by the proceeding.[17] The Commission has identified properly and included small CLECs and ISPs in its IRFA. However, the Commission is deficient in its recognition and analysis of small ILECs. The Commission's continued allegation that small ILECs cannot qualify as small businesses is incorrect[18] and thus contrary to law. The Commission has justified its conclusion that an ILEC cannot be a small entity because it is dominant in its field of operation.[19] A lack of dominance in its field of operation is one of the Small Business Act's criteria for defining a small business concern, 15 U.S.C. § 632, and the SBA's implementing regulations for the Small Business Act indicate that dominance in a "field of operation" is determined on a national basis. 13 C.F.R.§ 121.102.[20] Small ILECs, by any measure, are not dominant in the national telecommunications industry. Therefore, small ILECs

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[16] *Id.*

[17] 5 U.S.C. §§ 603(b)(3), 603(b)(4).

[18] *NPRM*, para. 222.

[19] Regulation of Small Telephone Companies, *Notice of Proposed Rulemaking*, 51 Fed. Reg. 45912 (proposed Dec. 23, 1986).

[20] The SBA is the exclusive arbiter of small business size standards, as authorized by Congress. *See Northwest Mining Assoc. v. Babbitt*, 5 F. Supp.2d 9, 15 (D.D.C. 1998)(citation omitted)("The RFA requires agencies to use the Small Business Administration's definition of small entity."). Therefore, the SBA's regulations are controlling when determining a definition of small business. The SBA defines small ILECs under Standard Industrial Classification Code 4813, Telephone Communications, Except Radiotelephone, as entities with 1500 or fewer employees. 13 C.F.R. § 121.201

qualify as small entities under the Small Business Act and the RFA and are subject to a complete regulatory flexibility analysis by the Commission.

To the Commission's credit, since 1996 it has included small ILECs in its regulatory flexibility analyses consistent with SBREFA requirements, which makes all such analyses judicially reviewable. However, the Commission's analysis is cursory and its promise to analyze the burdens on small ILECs is illusory. To wit, in this *NPRM*, small ILECs are subject to the same requirements as the large ILECs, such as the Regional Bell Operating Companies ("RBOCs") and GTE. Compliance burdens such as additional recordkeeping requirements that are inconsequential to the large ILECs can cripple a smaller ILEC. This was not addressed in the analysis. Moreover, small ILECs are not likely to have the market share or market power of the RBOCs and GTE, therefore regulations that are necessary to prevent a large ILEC from exerting undue influence on the market are not necessary for a small ILEC. Regulatory flexibility was implemented by Congress to combat this sort of uneven regulatory burden and to encourage agencies to implement regulations that address only those entities that are the source of the problem. In Section I.B.2, *infra*, we detail the deficiencies in the Commission's analysis of ILECs.

2. The Commission Failed To Describe Adequately The Proposed Reporting, Recordkeeping, And Other Compliance Requirements.

Advocacy contends that the Commission did not discharge its statutory duty to describe adequately the projected reporting, recordkeeping, and other compliance requirements. The Commission introduced six new potential compliance requirements in the *NPRM*: (1) listing of approved collocated equipment that meets safety requirements; (2) removal of obsolete equipment; (3) uniform national standards for the attachment of electrical equipment; (4) tours of

central offices; (5) report on available collocation space in the central office; and (6) detailed loop information.[21] Only three of these proposed compliance requirements were mentioned in the IRFA: (1) listing of approved collocated equipment that meets safety requirements; (2) report on available collocation space in the central office; and (3) detailed loop information. Of these, the Commission failed to disclose fully the proposed requirements of the approved equipment list and detailed loop information report.

The purpose of the IRFA is to solicit public comment on the proposed rules and to give notice to small entities of projected requirements.[22] The Commission cannot receive meaningful comments on the impact of the proposed rules if the Commission fails to mention projected compliance requirements. The absence of public notice to small entities of such requirements not only violates the RFA but weakens the quality of the responses the FCC will receive and limits the possibility of receiving feasible alternatives to the proposed regulations.

Advocacy reminds the Commission that the RFA requirement necessitates a description of projected reporting, recordkeeping, and other compliance requirements.[23] Advocacy notes that two of the three requirements that are not listed in the IRFA are ones that contain compliance requirements other than reporting or recordkeeping. Any proposed rule which would place a requirement on small entities, whether reporting, recordkeeping, or otherwise, must be listed in the IRFA. Small entities must meet the same burden of compliance when equipment must be purchased or upgraded as when large reports must be produced. Advocacy discusses below the deficiencies in the IRFA regarding the six compliance requirements.

a. Equipment Approval For Collocation In Central Offices.

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[21] *See* Section I.B.2.a-f, *infra*.
[22] 5 U.S.C. § 603.
[23] 5 U. S.C. § 603(b)(4)(emphasis added).

In the *NPRM*, the Commission tentatively concluded that ILECs may require CLEC equipment to meet safety requirements before collocation at the central office.[24] Also, the Commission concluded that ILECs are required to list all approved equipment and all equipment the ILEC uses.[25] Both of these tentative conclusions place burdens on small entities, while only half of the ILEC burden (creation of the approved equipment report) is mentioned in the IRFA.[26]

To comply with the first conclusion, some CLECs may be required to upgrade their equipment. A small CLEC would have to spend money to procure equipment that is approved by the ILEC. The Commission's goal of requiring equipment that will not endanger other equipment or the telephone network is a laudable one. However, a laudable goal does not suspend the Commission's statutory duty to include an analysis of this burden in the IRFA on all small entities affected.

For the second conclusion, the Commission does include a brief reference in the IRFA that ILECs are required to produce a listing of all equipment approved for use at the central office.[27] Unfortunately, the IRFA does not address that the approval is conditioned on safety. Furthermore, the IRFA makes no mention of the requirement for ILECs to produce a report on all equipment they use.[28] Both of these proposals have compliance costs.[29] Commission has a statutory duty to disclose both of these reporting requirements in the IRFA.

b. Removal Of Obsolete Equipment From Central Offices.

In the *NPRM*, the Commission sought comment on whether the FCC should require

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[24] *NPRM*, para. 134.
[25] *Id.*
[26] *Id.* para. 225.
[27] *Id.*
[28] *Id.* para. 135.
[29] ILECs must review every type and brand of equipment that could be used in interconnection and determine if it meets safety standards. The ILECs must also compile a list of every piece of equipment it uses in the central office, which may be extensive if the ILEC has many central offices that were designed and equipped in different

ILECs to remove obsolete equipment and non-critical equipment in central offices and whether the FCC has the authority to do so.[30] It is Advocacy's position that if a compliance requirement for small entities would result from a general request for comments, the Commission must describe the comment request in the IRFA and allow small entities an opportunity to comment.[31] Therefore, this general request for comment on equipment removal should have been included in the IRFA, as the Commission can use this request for comment in the *NPRM* as the basis for adopting a final rule in the Report and Order.

Advocacy believes the removal of obsolete equipment can be a burdensome compliance requirement for small entities.[32] Small and rural ILECs often use older equipment because of the lack of demand upon their switches and the lack of financial capability to replace the equipment. Furthermore, since these switches are providing telephone service reliably, small ILECs may have no immediate need to replace a functioning piece of equipment even if it is older. The Commission needs to solicit comments on the costs of its proposal to determine the economic burden this requirement would have on small entities before imposition on small ILECs.

c. Uniform National Standards For Attachment Of Electronic Equipment.

The Commission tentatively concluded to adopt uniform national standards for attachment of electronic equipment.[33] Advocacy agrees with the Commission's reasoning. A simple set of national requirements would reduce new entrants' costs, speed their time to market, and reduce

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manners. Both of these requirements place burdens of small ILECs

[30] *NPRM*, para. 142.

[31] Advocacy believes that the term "tentatively concluded" is irrelevant to determining whether or not to include a proposed regulatory requirement in the IRFA. The FCC has used language similar to this general request for comment as the basis for a final rule in the past. *See e.g.*, *In re* Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Second Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. 96-115 (rel. Feb. 26, 1998) ("*CPNI Second R&O*").

[32] The physical removal of the equipment involves expenses in labor and transportation. Also, the ILEC may be required to replace the obsolete equipment.

confusion. If a CLEC requesting interconnection knows in advance what equipment can be attached and how, it can plan in accordance. Furthermore, attachment of electronic equipment would no longer vary from central office to central office, which would reduce time and money spent negotiating the attachment.

However, as stated above,[34] excellent reasoning does not excuse a statutory duty to address the economic impact of this proposal on all small entities. The proposed regulation would create a compliance burden on the ILECs and should have been disclosed in the IRFA. To comply with this proposed regulation small ILECs would have to ensure that its equipment meet uniform national standards.[35] Moreover, the Commission must seek public comment on the nature and cost of compliance with uniform national standards on small entities and weigh these comments on burdens against perceived benefits of the requirements.

The Commission should also consider significant alternatives as per Section 603(c) of the RFA.[36] The cost to restructure each central office is prohibitive on small ILECs. An exemption for small ILECs may be necessary if the cost of compliance is too great for an ILEC to reasonably meet.[37] At the least, the Commission should consider a timetable to allow small ILECs to reach compliance with any uniform national standards. As CLECs are concentrating primarily on urban and business corridors, a delay for small ILECS (that are most likely located in rural areas which are historically slow to competitive activity) in meeting the national uniform standards will not adversely affect competition.

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[33] *NPRM*, para. 163.
[34] *See* Section I.B.2.a., *supra*.
[35] Compliance could require the purchase of new equipment or altering existing equipment.
[36] *See* Section I.B.3., *infra*.
[37] 5 U.S.C. § 603(c)(4).

d. Tours Of The Central Office.

The *NPRM* tentatively concluded that if an ILEC denies a request for physical collocation due to space limitations, the ILEC must allow any competing provider that is seeking physical collocation a tour of the central office.[38] Again, the proposed regulation would impose a compliance requirement on ILECs that was not discussed in the IRFA. If the FCC's tentative conclusion is adopted as a final rule, small ILECs would be required to allot employees to providing tours of the central office. When the ILEC is large with thousands of employees, this requirement may not be onerous, but when the ILEC is small and has only a limited of employees, the requirement is much steeper.

Advocacy contends that this proposed requirement may not be necessary for small ILECs. The *NPRM* tentatively concluded that ILECs will continue to provide detailed floor plans to the State Commission. The *NPRM* is unclear on how the tour will provide any additional information to the CLEC. Other efforts would better serve the CLECs need for quick, efficient interconnection than requiring guided tours of central offices.

In the *NPRM*, the Commission tentatively concluded that ILECs must provide interconnection at remote terminals. Advocacy asks the Commission whether the ILEC must provide detailed floor plans and tours of remote terminals as well as the central office.[39]

e. Report On Available Collocation Space.

The *NPRM* tentatively concluded that an ILEC must submit a report to a requesting CLEC on the ILEC's available collocation space.[40] The *NPRM* indicated that the report should:

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[38] *NPRM*, para. 146.
[39] *See* Section II.B.3, *infra*.
[40] *NPRM*, para. 147.

(1) specify the amount of collocation space available at each requested premises; (2) the number of collocators; (3) any modifications in the use of collocation space since the last report; and (4) include measures that the ILEC is taking to make additional space available for collocation.[41] The IRFA's disclosure on specific requirements was vague and left important time-frame questions unanswered. The Commission should have detailed how thorough these reports should be, how long after the adoption of the final rules can a CLEC make a collocation space report request, and how long does the ILEC have to respond. In the IRFA, the Commission also failed to discuss the type of professional skills necessary to produce the report.[42] In addition, the Commission did not address any significant alternatives that would minimize the economic impact on small entities for preparation of the reports.

Advocacy believes that this reporting requirement imposes a burden on small ILECs that is disproportionate to the benefit to CLECs. Advocacy interprets the language of the *NPRM* to mean that an ILEC will have to create a separate report for each central office. Due to the number of central offices that are part of the ILEC's network, the reporting requirement may be extensive. Furthermore, in light of the FCC's tentative conclusion later in the *NPRM* that would require ILECs to allow interconnection at remote terminals,[43] Advocacy asks the Commission to determine whether ILECs are required to produce collocation space reports for remote terminals as well. If so, the burden on ILECs is even greater and should be given careful consideration of whether the cost is worth the benefit.

Advocacy encourages the Commission to consider alternatives to the collocation space

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[41] *Id.*
[42] 5 U.S.C. § 603(b)(4).
[43] *See* Section II.B.3, *infra.*

reports for small ILECs.[44] The Commission should consider exemptions for small ILECs that do not possess the means to produce the reports. Also, the Commission should consider allowing a small ILEC to make a collocation space report which apply to many central offices at once. The FCC should also consider a longer timetable for small ILECs to produce the reports. Adoption of these alternatives would allow the CLECs to receive collocation information but would ease the reporting burden on small ILECs.

f. Detailed Loop Information.

In the *NPRM*, the Commission tentatively concluded that ILECs must provide CLECs with detailed loop information.[45] Specifically, the Commission proposed requiring ILECs to provide requesting CLECs with the following information: (1) whether the loops pass through remote concentration devices; (2) what electronics are attached to loops; (3) condition and location of loops; (4) loop length; (5) electrical parameters that determine the suitability of loops of various digital subscriber line ("xDSL") technologies; and (6) other loop quality issues.[46] The Commission briefly mentions the detailed loop information disclosure in the IRFA but does so in a glancing and inconsequential manner. The IRFA's description in its totality is "the NPRM tentatively concludes that incumbent LECs should be required to share information about loops with new entrants."[47] The description does not specify that the reports must be "detailed" as stated in the main text of the *NPRM*. Furthermore, the IRFA does not disclose the six specific elements listed above that are contained in the *NPRM*. Advocacy does not believe that one sentence with a vague reference to a proposed reporting requirement is sufficient to discharge the FCC's duty to describe projected reporting requirements under the RFA, especially considering

[44] *See* Section I.B.3., *infra*.
[45] *NPRM*, para. 157.
[46] *Id.*

the FCC has enumerated specific recommendations in the *NPRM*.

The proposed detailed loop information reporting will impose a significant economic burden on small ILECs. Although not exactly specified, Advocacy interprets this requirement as necessitating a separate report on each loop, as loops will vary in length, location, quality, and attachment of electronics. Therefore, a small ILEC must produce a separate report for each of its loops. These reports would contain detailed specific information such as equipment attached, location, and length, while included interpreted information, such as the suitability of the loop for xDSL technology. The detailed loop information reports require substantial clerical and technical preparation, which places a disproportionate burden on small ILECs who have fewer resources than larger ILECs.

The Commission should also consider the necessity of the detailed loop information report. In the *NPRM*, the Commission proposed several regulations that would encourage interconnection and competition, including a provision that ILECs have burden of demonstrating that it is not technically feasible to provide requesting carriers with xDSL-compatible loops,[48] to provide a particular type of interconnection requested by the CLEC,[49] and to provide the CLEC with an equal alternative if interconnection is infeasible.[50] The other proposed requirements render the detailed loop reports of less consequence to ensuring interconnection and competition. Advocacy believes that the burden on small ILECs outweighs the benefit to the CLECs and does not further the deployment of advanced telecommunications services.

The Commission can overcome this imbalance by adopting alternatives that would lessen the economic impact of the detailed loop information reports. Advocacy recommends that the

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[47] *Id.* para. 225.
[48] *Id.* para. 167.
[49] *Id.* para. 171.

Commission consider either exempting small ILECs or establishing different reporting requirements for them.[51] Adopting alternatives that would reduce the compliance burden would overcome the disproportionate impact on small ILECs

3. The Commission Failed To Consider Alternatives That Minimize Significant Economic Burdens On All Small Entities.

In addition to the deficiencies in providing significant alternatives for the three compliance requirements discussed above,[52] Advocacy has an overriding concern of the Commission's neglect to address alternatives for small ILECs. We assert that the Commission failed to meet its statutory duty to describe significant alternatives to the proposed rule, which accomplish the stated objectives while minimizing any significant economic impact.[53] The Commission failed to consider the four significant alternatives laid out by Congress in the RFA.[54]

Congress specifically listed four different alternatives that agencies were to consider during the preparation of the IRFA: (1) differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance or reporting requirements for small entities; (3) use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[55] The Commission did not address any of these alternatives in the text of the IRFA. Instead, the IRFA impermissibly placed the burden on small entities to recommend alternatives.

In the IRFA, the Commission stated that it would separately consider regulatory flexibility

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[50] *Id.*
[51] 5 U.S.C. § 603(c)(4).
[52] Uniform National Standards, Collocation Space Report, Detailed Loop Information Report. See Section I.B.2. (c), (e), and (f)., *supra.*
[53] 5 U.S.C. § 603(c).
[54] 5 U.S.C. § 603(c)(1)-(4).

analysis for small ILECs.[56] However, the Commission does not carry through with that statement when considering regulatory alternatives. Instead, the Commission stated that CLECs, including small-entity CLECs, would "obtain access to inputs necessary to the provision of advanced services."[57] The Commission stated in the IRFA "we tentatively conclude that our proposals in the NPRM would impose minimum burdens on small entities" without addressing the impact of the three regulatory burdens disclosed in the IRFA on small ILECs. In the absence of such analysis of the burden on small ILECs, this statement is unsubstantiated and possibly false.

C. The Commission Should Revise And Re-Submit For Public Notice and Comment Its Initial Regulatory Flexibility Analysis.

As discussed above, the Commission's IRFA is fatally flawed on several accounts. Therefore, it is necessary that the Commission revise the IRFA and re-submit it for public notice and comment to meet the statutory requirements of the RFA and the APA. A defective IRFA prevents the opportunity for public notice and comment which is required under the APA, which in turn, undermines the rulemaking record an agency needs to make factual conclusions.[58] Even prior to the SBREFA amendments, courts have held that failure to undertake a proper regulatory flexibility analysis as part of the rulemaking could result in arbitrary and capricious rulemaking.[59] Today, SBREFA allows for judicial review of the Commission's Final Regulatory Flexibility Analysis ("FRFA"),[60] the foundation of which is a sufficient IRFA. For this reason, Advocacy believes that the FRFA cannot be in compliance with the RFA unless the IFRA is cured by

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[55] 5 U.S.C. § 603(c)(1)-(4).
[56] *See* Section I.B.1., *supra*.
[57] *NPRM*, para. 226.
[58] *McGregor Printing Corp. v. Kemp*, 20 F.3d 1188, 1194 (D.C. Cir. 1994); *see also MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988).
[59] *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 538 (D.C. Cir. 1983).
[60] 5 U.S.C. § 611.

revision and re-submission for public comment.[61]

It is incumbent on the FCC, as the expert agency authorized by Congress, to know what is required by both large and small telecommunications entities to comply with its proposed regulations, and to undertake a threshold analysis of the impact of such compliance on small entities at the *NPRM* stage. It is this analysis that provides small entities adequate notice of potential regulatory burdens that may be required of them. A re-submission of the IFRA, taking into account Advocacy's concerns presented in these Comments, should not be an extraordinary burden on the Commission nor hinder this rulemaking proceeding. The Commission does not need to re-release the entire *NPRM*. A revised IRFA can be released in a Public Notice format, which will lessen the burden on the Commission but still provide ample notice to small entities. Furthermore, Advocacy has conveniently identified all the small entities affected, the compliance regulations that would impact small entities, and some alternatives the FCC should consider in the revised IRFA, enabling the Commission to issue a new IRFA without delay.

When preparing the revised IRFA, Advocacy reminds the Commission that it must include any proposal or general request for comments that can lead to a final rule even if it is not identified by the Commission as a "tentative conclusion" in the *NPRM*. The Commission has relied in the past on such general language as the basis of final rules.[62] Advocacy asserts that this practice is impermissible under the APA and RFA Nonetheless, if the Commission continues to rely on general proposals or requests for comment as the basis of a final rule, the Commission must, at minimum, disclose in the IRFA potential regulations and give small entities adequate

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[61] *See Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp 1411 (M.D. Fla. 1998), see also *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp.2d 9 (D.D.C. 1998).

[62] *See e.g. CPNI Second R&O; see also* Office of Advocacy Ex parte Petition for Reconsideration, Dec. 12, 1997 (commenting on the imposition of the anti-brokering and hoarding rules after inadequate notice and comment for *In re* Toll Free Service Access Codes, CC Dkt. No. 95-155 *Second Report and Order,* FCC 97-123 (rel. Apr. 11,